

ABA Staff Analysis: Americans with Disabilities Act DOJ Final Rule on ADA Standards for Accessible Design August 2010

I. Introduction

July 26, 2010 was the twentieth anniversary of the passage of the Americans with Disabilities Act (ADA), a law intended provide broad and comprehensive civil rights protection to individuals with disabilities to ensure that they have equal access to goods and services, accommodations, employment, transportation, government services, and telecommunications. The Department of Justice (DOJ) recognized the anniversary with the announcement of a final rule adopting revised ADA Standards for Accessible Design (2010 ADA Standards),¹ accessibility standards and requirements for certain existing as well as newly constructed or altered commercial facilities and places of public accommodation. The 2010 ADA Standards replaced the accessibility standards that had been in place since 1991 (1991 ADA Standards).² Of particular interest to financial institutions are requirements for new and existing ATMs.

In addition, on July 26, 2010, the DOJ announced two advanced notices of proposed rulemaking (ANPRs) to adopt *additional* ADA regulations to ensure the accessibility of movable or portable equipment and furniture, including ATMs that are not permanently affixed to a bank branch, and to ensure accessibility of public websites.³

The DOJ's announcements underscore a reality of ADA compliance: ADA compliance is not static. Bank compliance obligations – particularly with respect to accessibility standards – are continually changing. Changes in technology including the Internet, video interpreting services, screen readers, and text messaging, are just a few examples of technologies that were rare or nonexistent twenty years ago but are now widely used by individuals with disabilities. Thus, the ADA imposes continuing and changing obligations on institutions to review the regulations and their compliance programs to ensure that ADA policies are up to date, understood by employees, and enforced, *and* that facilities, goods, and services are accessible to the disabled. Accessibility measures that previously may have been impractical or too costly may now be possible and affordable.

To facilitate this analysis as it applies to the newly adopted standards for ATM accessibility, ABA offers the following general review of what is required by Title III of the ADA followed by a suggested framework for considering your bank's obligations with respect to the ATM accessibility standards.

II. Summary of provisions related to ATMs

While banks should review all aspects of the new rules, the newly adopted accessibility standards for ATMs deserve particular attention. **New ATMs will have to conform to all requirements of the 2010 ADA Standards. However, with respect to *existing* ATMs, bank obligations differ. Existing ATMs are not required to be modified in order to meet the height and reach and other physical access requirements (unless under certain circumstances, they are "altered,") but *whether existing ATMs must be modified to comply with communication-related elements of the 2010 ADA Standard will depend on the individual bank based on a number of factors. These communicative elements (the speech output requirements) are considered "auxiliary aids or services," which must be provided on existing ATMs unless it is an "undue burden," based on factors enumerated in the regulation and discussed below in Part III, a.***

¹ The final rule has not yet been published in the Federal Register, but it is available on the DOJ's website at <http://www.ada.gov/regs2010/ADAregs2010.htm>.

² See 28 C.F.R. part 36, Appendix A, available at <http://www.ada.gov/reg3a.htm#Anchor-Appendix-52467>.

³ See 75 Fed. Reg. 43452, 43455 (July 26, 2010) (ANPR on equipment and fixture accessibility standards); 75 Fed. Reg. 43460 (July 26, 2010) (ANPR on website accessibility standards).

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The Final Rule established a compliance date six months after publication of the rule in the *Federal Register*, but as will be explained subsequently, that does not mean that all required upgrades must be completed by that date. Rather, the ADA simply requires each institution to implement a compliance plan by the effective date of the rule.

Part III, below, outlines the general rules applicable to the ADA, focusing on Title III compliance. Applying this information, Part V provides a suggested framework for considering your bank's obligations with respect to the 2010 ATM accessibility standards.

III. The basics of ADA compliance

The ADA contains several titles. The primary titles of concern to banks are Title I, governing employment, and Title III, governing access to public facilities, products and services.

The ADA authorizes the Equal Employment Opportunity Commission (EEOC) and the DOJ to investigate alleged violations of the ADA, and both agencies are charged with enforcement. The EEOC initiates enforcement actions related to employment under Title I, and the DOJ initiates enforcement actions related to public access under Title III. In addition, the ADA includes a private right of action, and courts are empowered to award compensatory money damages and injunctive relief, including mandatory orders to make a facility accessible.

Title III requires that public accommodations and commercial facilities be designed, constructed, and altered in compliance with ADA Accessibility Guidelines (ADAAG) drafted by the Architectural and Transportation Barriers Compliance Board (Access Board), an independent federal agency that develops and maintains accessible design criteria. The DOJ, in turn, is required to issue regulations adopting accessibility standards that are consistent with the ADAAG. Once adopted by the DOJ, the Access Board's *guidelines* become *legally binding and enforceable* accessibility standards. In addition, the DOJ determines the extent to which these guidelines are applicable to barrier removal in existing facilities.

The ADA Amendments Act of 2008 (ADAAA)⁴ made a number of significant changes to the definition of the term "disability." By enacting these changes, Congress made it clear that the definition of disability should be construed in favor of broad coverage of individuals; as a result it will be much easier for individuals seeking the laws protection to demonstrate that they meet the definition of disability. The ADAAA defines a disability as:

- A physical or mental impairment that substantially limits one or more major life activities; or
- A record of a physical or mental impairment; or
- Being regarded as having such an impairment.⁵

IV. Requirements of the Nondiscrimination provisions of Title III

A dominant theme of the ADA is the integration of individuals with disabilities into mainstream society. Thus, section 302(a) of the ADA states:

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.⁶

⁴ 42 U.S.C. §12101 et seq.

⁵ 42 U.S.C. §12102.

⁶ 42 U.S.C. §12182.

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In addition, Title III contains specific requirements addressing:

- Eligibility criteria that screen out or tend to screen out persons with disabilities from enjoying goods and services;
- Modifications in policies, practices, and procedures when necessary to afford goods and services to those with disabilities;
- Provision of auxiliary aids and services to existing facilities, if not an "undue burden;"
- Removal of barriers in existing facilities, if "readily achievable;"
- Standards of accessibility in designing and constructing new facilities and in altering existing facilities.

As is evident from the list above, Title III is not just restricted to physical access at the branch and teller window; access to bank products and services, such as loan and deposit accounts, is also covered. In many cases, accessibility to facilities, products, and services may be easily achieved, for example, by, moving chairs, having tellers serve persons in wheelchairs from the front of the teller counters, and passing written notes to deaf customers for simple transactions. Other aspects of compliance are clearly more complicated.

It is important to understand that most of the requirements of Title III are not black and white, but can vary on a case by case basis determined by bank resources (and those of the bank holding company, if applicable), the cost of a particular measure, and the needs of disabled individuals. Moreover, as mentioned previously, a bank's compliance obligations are not static; factors such as the institution's resources, the cost of accommodations, and technology will change an institution's ADA duties.

a. Auxiliary aids and services and the "undue burden" standard

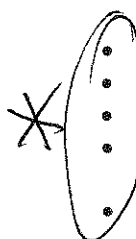
Public accommodations must provide auxiliary aids and services to disabled customers with two exceptions: 1) if the steps would fundamentally alter the nature of the goods and services; or 2) the measures would impose an "undue burden." In these cases, an alternative aid or service must be furnished if it exists. As noted above, the requirement to provide auxiliary aids and services as defined in the regulation is a continuing one that should be periodically reviewed, especially as new technologies available become available.

Auxiliary aids and services are those designed to provide effective communication. The provision is intended to assist those with disabilities affecting hearing, vision, or speech. A few examples are: qualified interpreters; written materials; audio recordings; Braille materials; large print materials; and computer terminals. In addition, speech output capabilities on ATMs are now considered an auxiliary aid and service. Since passage of the ADA, technology has advanced considerably and may offer improved or less costly communication capabilities for those with disabilities. Banks should consult disabled groups to learn how they might use new technology to assist disabled customers better.

The requirement to provide auxiliary aids and services is a flexible one. A public accommodation may choose among various options, as long as the result is effective communication. A simple solution will often suffice. For example, it may be sufficient for a bank teller and a deaf customer to communicate by exchanging written materials. However, an interpreter for the deaf may be more appropriate in a complicated transaction, such as a mortgage settlement. New technologies, including video interpreting services, screen readers, and text messaging, offer additional possibilities for providing an auxiliary aid or service if a bank determines that doing so will not impose an undue burden.

As noted, auxiliary aids and services are only required if doing so does not impose an **"undue burden."** This is defined as a "significant difficulty or expense." What constitutes an undue burden is subjective and will be determined on a case-by-case basis. Factors to consider in making this determination include:

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- the nature and cost of the action; the overall financial resources of the site;
 - the number of persons employed;
 - the effect on expenses and resources;
 - legitimate safety requirements; the geographic proximity and other relationships of the parent entity; and
 - the financial resources of any parent entity.

The aggregate number and cost of auxiliary aids and services may influence the determination of whether an individual measure imposes an undue burden.

b. Removal of Barriers and the “readily achievable” standard

Generally, banks must remove architectural barriers in existing facilities where it is “readily achievable.” Readily achievable means “easily accomplishable and able to be carried out without much difficulty or expense.” While this standard is less burdensome than the undue burden standard, the same factors are relevant in making the determination. The regulation specifically provides that rearrangement of temporary or movable structures such as furniture and display racks is not readily achievable to the extent that it results in a significant loss of selling or serving space. It is important to note that the obligation to remove barriers is a continuing one. Thus, steps which initially are not readily achievable may later be required as circumstances change.

Examples of barrier removal include: installing ramps; rearranging tables, chairs, display racks and other furniture; installing flashing alarm lights; widening doors; and installing accessible door hardware. While teller counters may impose a barrier to persons using wheelchairs, removing a portion of the teller counter is probably not necessary. Legitimate safety considerations “that are necessary for crime prevention measures” may be considered. Since high teller counters provide important security protections and there are alternative means of serving persons using wheelchairs, lowering the counter is probably not required.

The regulations suggest priorities in removing barriers. The highest priority is measures which enable disabled individuals to enter the building or facility. Second are the areas where goods and services are provided. Finally, public accommodations should address access to restroom facilities and any other measure to provide access to the goods and services of the public accommodation.

If barrier removal is not readily achievable, goods and services should be provided by alternative means, if readily achievable. In the case of banks, online and mobile banking could provide an appropriate alternative. Individuals with disabilities may not be charged for the cost of these services if they are the only acceptable alternative for providing accessible service.

Finally, within the barrier removal provision of the final rule, the DOJ provides a “safe harbor” for elements in existing facilities that comply “with the corresponding technical and scoping specifications for those elements in the 1991 ADA Standards”—i.e., the specifications for clear access, height, and reach. These elements do not have to be modified in order to comply with the requirements of the 2010 ADA Standards.⁷

c. New construction

The ADA requires newly constructed places of public accommodation to be “readily accessible to and usable by persons with disabilities.” This mandate contemplates a high degree of convenient access. The strict standard reflects the recognition that it is easier to make buildings and facilities accessible during the design and construction stages rather than renovate after construction is complete. As

⁷ See 28 C.F.R. §36.304(d)(2)(i).

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previously explained, the Access Board's ADAAG establishes the standard for accessible design with respect to new construction.

d. Alterations

A standard similar to the new construction standard applies when buildings and facilities are altered, as by renovation or remodeling. Such alterations must be made in order to ensure "to the maximum extent feasible" that the altered portions of the facility are readily accessible to and usable by individuals with disabilities. The concept of feasibility only encompasses whether it is possible to make the alteration so that the altered area is accessible. Cost is not a consideration.

An "alteration" is a change which "affects or could affect the usability of the building or facility." Examples of alterations include: remodeling; renovation; changes in structural parts or elements; and changes in the placement of walls or full-height partitions. Normal maintenance, reroofing, painting, or changes to mechanical and electrical systems are not considered alterations. Generally, it is only the altered portion which must be made accessible. For example, if an electrical outlet is moved or a door handle replaced, then only the electrical outlet or the door handle must comply with the accessibility standards. Such measures do not trigger requirements for extensive changes throughout the area of the alteration.

V. Framework for achieving compliance with the new accessibility standards for ATMs

Since the enactment of the ADA, ATMs have posed special challenges to banks. Their unique hybrid nature combines structural elements – i.e., clearance, height, and reach requirements – subject to barrier removal requirements *and* communicative elements – i.e., speech output functionality – subject to auxiliary aid and service requirements. Throughout the extended rulemaking process, ABA asserted that the communicative elements (i.e., the speech output capabilities of each machine) are essentially structural in nature. Accordingly, we consistently urged the DOJ to consider ATMs under the barrier removal provisions which would permit the DOJ to grant a "safe harbor" for existing ATMs that comply with the 1991 ADA accessibility standards.⁸ However, in the final rule issued on July 26, 2010, DOJ declined to provide a safe harbor, stating:

The communication-related elements of ATMs are auxiliary aids and services, rather than structural elements.... Thus the safe harbor provision does not apply to these elements. The [DOJ] believes that the limitations on the effective communication requirements, which provide that a covered entity does not have to take measures that would result in a fundamental alteration of its program or would cause undue burdens, provide adequate protection to covered entities that operate ATMs.⁹

Nonetheless, there remain questions about what the DOJ considers to be a "communication-related element" and what it considers a structural element. It is clear, however, that the DOJ considers the speech output elements of ATMs an auxiliary aid or service. Therefore, financial institutions must consider modifying or upgrading existing ATMs that do not comply with the communication-related specifications of the 2010 ADA Standards, including the speech output specifications. Section 707 of the ADAAG lists these technical requirements.¹⁰

It is also clear that the DOJ considers the structural elements of ATMs – the access, height and reach elements – to be subject to the barrier removal provisions of the ADA and subject to safe harbor if they comply with the requirements of 1991 ADA Standard. Indeed, in response to an ABA inquiry, DOJ legal

⁸ A copy of ABA's 2008 comment letter is available at <http://www.aba.com/aba/documents/Compliance/2010/ADAComment2008.pdf>.

⁹ See <http://www.ada.gov/regs2010/ADAregs2010.htm>.

¹⁰ See Section 707 of the 2004 ADAAG which sets out the technical requirements for ATM accessibility including height, reach range, keyboard and speech output specifications, available at <http://www.access-board.gov/ada-aba/final.cfm#communication>.

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staff replied, "ATMs that comply with the technical and scoping requirements for physical access from the 1991 Standards are subject to the safe harbor provisions."¹¹

Whether a keyboard is a structural or a communication element is not addressed in the final rule. However, ABA believes that the physical nature of a keyboard clearly falls within the definition of a "communication barrier that is structural in nature" expressly defined as an architectural barrier¹² subject to the safe harbor.

Finally, the DOJ announced that the 2010 ADA Standards are effective six-months following publication of the final rule in the Federal Register. As previously discussed, however, the six-month compliance date announced in the final rule does not mean that all financial institutions are required to have completed an upgrade of the communication-related elements of all existing ATMs by that date. Rather, the ADA simply requires each institution to implement a compliance plan by the effective date of the rule. Steps to consider taking include:

1. Inventory your institution's existing ATMs. For each ATM, including drive-up ATMs,¹³ record the manufacturer, the model number, and year the machine was manufactured, if available, or alternatively, the year the ATM was installed. Also, make note of the software operating system, and speech output capabilities. If you do not have evidence or documentation of compliance with the access, height and reach requirements of the 1991 ADA Standards, you might also note the access route, height, and reach range of each ATM.
2. Compare each ATM's specifications to the 1991 ADA Standards and the 2010 ADA Standards. Compare the communication-related elements – i.e., the speech output capabilities – to the new 2010 ADA Standards. If any of your ATMs do not comply with the specifications of section 707, working with your ATM vendor, determine the feasibility of upgrading those ATMs to comply with the new communication requirements of the 2010 standard. Whether the ATM can be upgraded and the cost of any upgrade will depend on the model and age of the ATM. Your ATM vendor(s) should be able to help with this process as they know the capabilities and specifications of each of their ATMs and should be familiar with the ADA accessibility standards.

If you do not otherwise have evidence or documentation of compliance with the physical access elements of the 1991 ADA Standards, compare physical access elements – i.e., height, reach range, and ground space access – to determine whether the physical access elements comply with the 1991 ADA Standards and are subject to the safe harbor provision of §36.304(d)(2)(i).

3. Consult with your ATM vendor(s) to determine the cost of each upgrade. Remember to factor into these costs all employee hours spent installing new software or hardware and any employee training costs.
4. Establish a budget, strategic plan, and schedule for achieving ATM accessibility. As part of this determination, consider the test for "undue burden." Communicative elements must be modified unless doing so would be an undue burden. As previously discussed, what is an undue burden is subjective and will be determined on a case-by-case basis. (See Part III, a. above) Factors to consider in creating the strategic plan include:
 - the nature and cost of the upgrades;
 - alternative methods to serve the disabled; and
 - the overall financial resources of the bank and those of the bank holding company, if applicable.

¹¹ Email dated August 12, 2010 from Janet Blizard, Deputy Chief, Department of Justice, Civil Rights Division.

¹² See 28 C.F.R. §36.304(a).

¹³ Drive-up ATMs must be accessible to blind and visually impaired passengers in a vehicle.

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Remember that existing ATMs need only be modified to comply with the physical access requirements if they (1) did not comply with the 1991 ADA Standards and (2) it is "readily achievable" to do so, based on the same factors enumerated above. For example, lowering an ATM to comply with the revised reach range of the 2010 ADA Standard may not be readily achievable. In addition, it is not necessary to upgrade keyboard configurations as there were no specific keyboard requirements in the 1991 ADA Standard, and ATMs compliant with the 1991 ADA Standard are subject to the safe harbor. New ATMs, however, should comply with the keyboard requirements of the 2010 ADA Standard.

Note that if an institution has multiple ATMs at one location, only one of these ATMs must be accessible. Also, recognize that if sued, the bank must demonstrate that it took readily achievable barrier removal efforts and provided auxiliary aids and services where doing so did not create an undue burden.

5. Revisit the strategic plan annually. As previously discussed, ADA compliance is not static. Much like the Community Reinvestment Act, the ADA imposes continuing and changing responsibilities that require banks to annually review the accessibility requirements, bank resources, and emerging technologies. Accessibility measures that previously were deemed too costly may now be affordable. Measures that may have been impractical may be made possible by new technology. In light of the continuing obligation to make facilities, products, and services accessible to the disabled, banks are required to annually review and modify their strategic plan for achieving ADA compliance.

VI. Conclusion

In light of the current economy and myriad regulatory pressures, the ADA may appear to be just one more compliance burden and expense. However, unlike many other compliance obligations, there is much to be gained from making the world more accessible to the disabled. Not only is it the right thing to do, it is also potentially good for business as it expands the market for bank products and services to the broadest range of customers. ABA urges all banks to undertake their continuing review of ADA compliance with this in mind.

Questions? Contact Virginia O'Neill for more information.

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